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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 130*

ALVIE D. KILLIAN,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLOBY & CO., Inc.,

Respondents.

BRIEF OF RESPONDENT, PENNSYLVANIA RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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* Formerly No. 876, October Term, 1948.

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I.

OPINION OF COURT BELOW.

The opinion of the Illinois Appellate Court is published in Abstract form only in the official reports: *Killian* v. *Pennsylvania Railroad Co., et al.*, 336 Ill. App. 152, 82 N. E. (2d) 834.* The petition of petitioner for leave to appeal to the Illinois Supreme Court was denied on March 22, 1949, without an opinion.

* The full text of the opinion of the Appellate Court appears in the record. (R. 1-13 both inclusive.)

II.

JURISDICTION.

This respondent submits that this court should not assume jurisdiction for the reason that the decision of the Appellate Court is in accord with the applicable decisions of this court.

III.

QUESTIONS PRESENTED.

It is suggested that the ultimate questions for determination are:

(a) Was the judgment of the appellate court correct in finding that the petitioner failed to establish negligence on the part of this respondent which proximately contributed in whole or in part to his injuries?

(b) Was the judgment of the appellate court correct in finding in substance that the conduct of the petitioner was the sole proximate cause of his injuries?

(c) Did the appellate court err in holding that the trial court should have directed a verdict for the respondents?

(d) Is the decision of the appellate court construing the provisions of the Federal Employers' Liability Act (45 U. S. C. A. 51-60), probably contrary to the applicable decisions of this court?

IV.

SUMMARY OF ARGUMENT.

A.

The Appellate Court correctly found that petitioner's evidence failed to establish any negligence on the part of this respondent.

1.

There was no evidence tending to establish negligence on the part of this respondent, in that it failed to perform any duty it owed to the petitioner to furnish him with a reasonably safe place to work.

2.

The failure of the members of the crew to warn petitioner of the danger of which he was fully aware did not constitute negligence, on the part of this respondent. There was no evidence, tending to establish that the members of the crew knew of the danger, or could have anticipated that the petitioner would leave a place of safety and go into a position of danger.

B.

The Appellate court did not err in holding that the trial court should have directed a verdict for the respondents, because there was insufficient evidence of negligence to submit that question to the jury.

C.

Petitioner's injuries solely and proximately resulted from his violation of well known rules of the respondent which it was his duty as conductor in charge of the switching operation to enforce and himself obey.

V.

RESPONDENT'S ADDITIONAL STATEMENT OF FACTS.

The statement of facts of the petitioner (p. 13 of brief) does not contain all the facts which are material to the consideration of the questions presented to this court for determination. Material and highly relevant facts upon

which the appellate court based its opinion have been omitted or inaccurately stated.

The accident in question occurred on July 18, 1945 (R. 92), on the premises of the co-respondent, P. R. Mallory & Co. Inc., (see, respondent Pennsylvania Railroad's Exhibit No. 5—R. 169; ad. in evidence, R. 168).

This plant was located adjacent to this respondent's railroad yards, and was entirely enclosed by "a high cyclone iron fence" (R. 110).

The petitioner, a conductor in the employ of this respondent, had orders (R. 92) to remove an empty coal car from the Mallory premises, and to bring in and spot a car of coal (R. 94, 96). This switching operation was the first job on that day (R. 108).

The petitioner with his crew arrived at the Mallory plant at four o'clock in the afternoon (R. 94, 122). It was a clear day (R. 92, 83). It was broad daylight at the time of the accident (R. 123, 130), which occurred at 4:20 P. M. (R. 130).

The petitioner, as conductor of the crew was in charge of the switching operation (R. 108-110). The members of the crew were under him (R. 127). He testified that "there was no other representative of the railroad company in or about that industry at that time that superseded me" (R. 110).

The petitioner was familiar with the layout of the Mallory plant (R. 110). He had been on this particular job six days a week, for five or six weeks prior to the accident, and had gone in the plant every day (Rec. 93). He had worked in the plant prior to that time (R. 112).

When the petitioner arrived at the plant on the day of the accident, the policeman (Larry Turner, an employee of the Mallory Co. R. 123, 124) opened the gate to let the engine and cars into the plant (R. 94). It was the duty of the

petitioner according to his testimony to "see that everything was clear" (R. 94-96) and to "get everything clear for us to come in there with a car of coal, and get the empty" (R. 94). He also said it was his job "to see if the way was clear before he brought the cars in" (R. 125).

In performance of that duty he "went ahead" (R. 125) and walked down the track to Moore Avenue* (R. 115). (See, R. 96.) When he arrived at Moore Avenue "these barrels were on the track" (R. 115, 126). He got in touch with the policeman "and directed that they be moved" (R. 115). He then walked to the north end of the track and picked up the empty coal car. When the engine and two cars moved out, he rode between the empty and the loaded coal car (R. 115). As the cars moved across Moore Avenue he stepped off on the pavement (R. 127, 128, 116) on the east side of the track (R. 128). He stayed at Moore Avenue while the engine and two cars moved out of the Mallory plant and left the empty car in the Pennsylvania yard (R. 97, 129). When the engine returned pushing the loaded coal car he was on the west side of the track (R. 116). It was moving two or three miles per hour (R. 115). He was on the same side of the track "that the barrels were". There was nothing to obstruct his vision (R. 130). His eyesight was good. He did not wear glasses in the performance of his work (R. 123). Just before he mounted the stirrup of the coal car "this barrel was twelve feet away" (R. 116, 130) to the north of him (R. 158, 159). These were the "drums" (barrels) which he subsequently "came into contact with" (R. 126, 99).

The engine pushing the loaded gondola car was going north. At the time the gondola approached him he was standing "back five feet" from the tracks (R. 116). Before

* The plat (R. 169) shows that Moore Avenue at the scene of the accident was inside the plant. It was approximately 125 feet from the gates of the plant. (R. 111.)

he stepped on the northwest corner of the car (R. 130), he looked in all directions. He had a clear view of the whole situation (R. 116). He had full authority to stop the train if the way was not clear (R. 110). After he got on the end of the car he noticed that the obstruction (barrel of oil) would not clear him (R. 99). As a consequence his right leg was pinched or "drug" between the barrel of oil and the car, (R. 99, 130) sustaining injuries to that leg.

The petitioner testified that he was familiar with Rules 105B, 108 (R. 109)* and with Safety Rule 1507 (R. 109, 158)† which were in full force and effect on the day of the accident, (R. 109-110); that it was his duty to enforce Rule 1507 (R. 109) and to see that a car moved into an industry "would travel in free and clear of obstructions" (R. 110).

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* Rule No. 105-B: Provided in substance that both the conductor and the enginemen are responsible for the safety of the train and observance of the rules, and under circumstances not provided for by the rules, must take every precaution for protection.

Rule No. 108: Provided in substance that in cases of doubt or uncertainty a safe course must be taken.

† Rule No. 1507: Maintain lookout in the direction engine or car is moving, to avoid coming in contact with structures alongside of or over tracks, or with cars, engines or trains on an adjacent track. (Bridges, buildings, coal chutes and aprons, fences, cattle guards, main cranes, platforms, poles, stock chutes or pens, switch standards, lamps, targets, signals, tunnels, standpipes, etc.)

VI.

ARGUMENT.

A.

The Appellate Court correctly found that petitioner's evidence failed to establish negligence on the part of this respondent.

The petitioner suggests that this respondent was negligent in two particulars, i. e.:

(1)

Failure to furnish the petitioner with a reasonably safe place to work.

(2)

Failure of other members of the crew to warn petitioner of a danger, (which in so far as it appears from the record, he was the only member of the crew who knew of its existence).

that the Appellate court, therefore erred in reversing the judgment of the trial court.

In respect to the first of these propositions (alleged failure of this respondent to furnish a safe place to work), the Appellate Court said (R. 5-6):

> "The only theory upon which the railroad company could be charged with failing to use reasonable care in affording plaintiff a safe place to work was in the failure to keep this track clear of impedimenta. At the time and place of this accident, according to his own testimony plaintiff himself was the agent of the railroad company charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties.

> That he recognized his obligation in this respect is indicated by the fact that he directed the watchman employed by the defendant Mallory Company to remove the offending barrels the first time the train proceeded down this portion of the track. If he had followed up his directions to the policeman to remove the barrels by an inspection it would have been apparent that they had not been removed. While contributory negligence constitutes no defense under the Federal Employers' Liability Act, nevertheless some underlying act of negligence on the part of the employer must be established before he is liable to the servant. The plaintiff has proven no negligence on the part of the railroad company in the care used to afford plaintiff a safe place to work."

The record shows without dispute* that it was petitioner's duty upon entering the Mallory premises to see that everything was clear, so that he could perform the duties assigned him, i. e., the removal of an empty coal car and the spotting of a loaded car of coal.

In the performance of these recognized duties, he entered the Mallory plant to make this inspection. He says he went ahead to see if the way was clear before he brought the cars in; that this was his job (R. 125).

He walked northward to Moore Avenue about a distance of 125 feet where he saw the barrels on the track, north of Moore Avenue. He directed the Mallory policeman to remove them. He then continued northward to the northerly end of the track, a distance of 250 to 300 feet. Somewhere north of Moore Avenue the loaded car of coal was coupled to the standing empty coal car, and the petitioner rode in between the cars, to Moore Avenue where he stepped off on the pavement.

The petitioner had arrived at the Mallory plant at four o'clock in the afternoon of July 18, 1945. The accident

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* The respondents offered no factual evidence as to the occurrence (R. 167, 168).

occurred at 4:20 P. M. From the time the petitioner first saw the barrels until the accident, not more than ten or fifteen minutes had elapsed.

At the time of the accident, one brakeman was in the Pennsylvania yard (R. 131) and the other was riding on the opposite, or east side of the loaded coal car, at the time of the occurrence (R. 131-132). There is no evidence which even remotely suggests that any member of the crew saw, could have seen, or even knew of the presence of the barrels adjacent to the track.

The other members of the crew were available, but were not called as witnesses for petitioner (p. 20, Petition of petitioner).

This respondent suggests that there is not even a scintilla of evidence in the record which shows or even tends to show that it was guilty of any negligence which proximately contributed in whole or in part to the injuries of the petitioner.*

This court has repeatedly asserted that a plaintiff to recover in an action based upon the provisions of the Federal Employers' Liability Act (45 U. S. C. A. 51-60) must establish two essential elements, i.e.; first, that the railroad company was negligent, and second, that such negligence was the proximate cause in whole or in part of the occurrence. (*Reynolds* v. *Atlantic Coast Line*, 336 U. S. 207; *Eckenrode* v. *Pennsylvania R. R. Co.*, 335 U. S. 329; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 67).

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* In *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, (p. 32), this court said that the "petitioner was required to present probative facts from which the negligence and the casual relation could reasonably be inferred". And in *Brady* v. *Southern R. Co.*, 320 U. S. 476 (p. 479), this court said there must be "more than a scintilla" of evidence before a jury question is presented.

It is respectfully suggested that the petitioner has failed to prove either of these elements essential to his recovery.

He was intimately familiar with the premises, through long experiecne working in and about the Mallory plant. As conductor he was in full and complete charge of the operation from its inception. The record shows that the only thing in or about the track to interfere with the movement of the train was the barrels in question. As he stood on Moore Avenue in broad daylight, he was at all times within ten or twelve feet of the barrels which were the cause of his injury. He was a railroad man of long experience. (32 years, R. 92). Even a glance in that direction would have been sufficient to show a lack of clearance. Yet with this knowledge and experience, he mounted the stirrup of the approaching car, and "took a chance" apparently that the clearance was sufficient.

This respondent earnestly submits this case clearly falls within the category of that class of cases decided by this court which have held that where the plaintiff's injury was *solely and proximately* caused by his own conduct there can be no recovery. (*Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329; *Hunter* v. *Texas Electric Ry. Co.*, Tex. 194 S.W. (2d) 281, aff'd. 332 U. S. 827.)

This court has held that, "The carrier's negligence must be a link in an unbroken chain of reasonably forseeable events."* This respondent if it had knowledge of the close proximity of the barrels to the track (which of course it did not) could not have anticipated in the exercise of reasonable care, that the petitioner would leave a place of safety five feet from the track (R. 116), and elect to mount the passing coal car with the barrels only ten or twelve feet away from where he stood.

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* *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 484.

This court, under circumstances similar or identical to those in the instant case has repeatedly denied certiorari.*

We submit that there is no evidence showing or tending to show any negligence on the part of this respondent. The petition for certiorari should, therefore, be denied.

(2)

With respect to the second of the above propositions under this heading, (the alleged negligence of members of the crew as a contributing cause of petitioner's injuries), the appellate court said (R. 7-8):

> "As this train approached Moore Avenue after having disposed of the empty car, plaintiff was standing on the west side of the track at the north end of the arc made by the curve in the tracks from the Mallory Company's gate to Moore Avenue. He was standing according to his own testimony, within either ten or twelve feet of the transgressing barrels or drums. It was a clear, bright, July afternoon. Plaintiff had an obligation to see that the barrels had been removed and was standing in such a position that he could not have failed to have seen the location of these barrels had he looked. The fact that he may have been required by company rule to have guarded the Moore Avenue crossing did not, in view of the circumstances in this case, prevent him from observing the condition of the track ten or twelve feet away. It is not apparent from the record just what opportunities the other members of the crew had at this time to observe the position of the barrels. One brakeman was on the opposite side of the car, whether on the front or rear car does not clearly appear from the record. It is to be assumed that the engineer and fireman were at their places at the right and left side of the cab re-

* This is adverted to simply as a statement of fact. We are aware that this court has said that its denial of a certiorari imports no expression of an opinion on the merits. (*Sunal* v. *Large*, 332 U. S. 174; *House* v. *Mayo*, 324 U. S. 42, 48); *Beamer* v. *Virginian Ry. Co.*, 181 Va. 650, 26 S. E. (2d) 43, cert. den. 321 U. S. 763; *Lasagna* v. *McCarty* (Utah) 177 P. (2d) 734, cert. den. 332 U. S. 829; *Wolfe* v. *Henwood* (8th Cir.) 162 F. (2d) 998 cert. den. 332 U. S. 773; *Fantini* v. *Reading Co.* (3rd Cir.) 147 F. (2d) 543 cert. den. 325 U. S. 856; *Waller* v. *Northern Pacific Term. Co.* (Or.) 166 P. (2d) 488, cert. den. 329 U. S. 742.

spectively. There is considerable question, in view of the curve upon which the train was approaching, whether the engineer and brakeman could clearly see the barrels. The fireman and plaintiff were on the same side of the engine, but whether the former was keeping a lookout from the cab or whether he was engaged in some other duty in the cab does not appear from the evidence. It could hardly be considered negligence on his part, however, knowing plaintiff to be riding the front end, if he were engaged in firing the boiler or some other required duty within the cab. In view of the silence of the record on these questions we can indulge in no speculations upon which to predicate a finding of negligence. It is certain that the plaintiff was in a position to ascertain where the barrels were located and that he had an obligation to see that they were in such position as not to afford danger to the engine or the crew. Without any intimation to the crew, as far as the record discloses, plaintiff stepped upon the stirrup of the lead car as the train reached him and within an interval of a few feet was injured. Under these circumstances we do not believe that there was any negligence on the part of the railroad company separate and apart from the negligence of the plaintiff."

Petitioner's argument in this respect is similar to the argument made and rejected in *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329.† The appellate court correctly found that (R. 9):

> "There is no proof in the record that any member of this crew **in the exercise of due care could have prevented this injury that the plaintiff voluntarily and suddenly placed himself in a position of danger, the presence of which he was in the best position to judge.**" (Emphasis supplied)

In *Brady* v. *Southern R. Co.*, 320 U. S. 476 at page 483, this court said:

> "Events too remote to require reasonable prevision need not be anticipated."

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† Cf. *Hunter* v. *Texas Elec. Ry. Co.* (Tex. 1946) 194 S. W. (2d) 281, aff'd 332 U. S. 827.

We submit that the occurrence in question clearly falls within this category.

B.

The appellate court did not err in holding that the trial court should have directed a verdict for the respondents, because there was insufficient evidence of negligence to submit that question to the jury.

As this respondent suggested under the proceeding heading (p. 9), before the plaintiff is entitled to recover under an action based upon the Federal Employers' Liability Act, he must establish negligence on the part of the railway company which contributed in whole or in part to his injury.

This court, as far as we are advised, has never held that every case under this Act must be submitted to a jury. On the contrary it has repeatedly held that the petitioner is required "to present *probative facts, from which negligence and the casual relation could be reasonably inferred.*"*

The jury are not permitted to indulge in "mere speculation" or substitute such speculation for "probative facts".†

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, this court in discussing the effect of the 1939 Amendment to the Federal Employers' Liability Act, said (p. 67):

> "They leave for practical purposes only the question of *whether the carrier was negligent* and *whether that negligence was the proximate cause of the injury.*

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* *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32; cf. *Brady* v. *Southern R. Co.*, 320 U. S. 476, 484.

† *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32; *Brady* v. *Southern R. Co.*, 320 U. S. 476, 484; cf. *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329.

> In this situation the employers' liability is to be determined *under the general rule which defines negligence as the lack of due care under the circumstances;* or the failure to do what a reasonable and prudent man would ordinarily have done under circumstances of the situation; or doing what such a person under existing circumstances would not have done." (Emphasis supplied)

The evidence (detailed under prior headings) shows that the petitioner knew and saw the location of the barrels; that he ordered them moved in the performance of his duties as conductor in charge of the crew, to provide clearance for the train and its crew, to enter and leave the Mallory plant in safety. There was no other evidence that even remotely suggested that the other members of the crew ever saw, or knew the presence of the barrels in question, as the appellate court found in its opinion. The petitioner at all times stood not more than ten or twelve feet from these barrels and knew they were there as he mounted the stirrup of the coal car moving two to three miles per hour.

It is most respectfully urged that these facts not only fail to show any negligence on the part of this respondent, but on the contrary conclusively demonstrate that plaintiff's injuries were solely and proximately sustained as a result of his own conduct.

The petitioner infers in his argument that even if he was guilty of contributory negligence that he was not thereby barred from his action against this respondent. It is sufficient answer to that contention to say the respondent did not base its defense on this ground. It contended in the trial court and in the Appellate Court that petitioner's injuries solely and proximately resulted from his own conduct and without any negligence on the part of this respondent. (R. 184, 199)

In *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, this court said that the weight of the evidence under the Federal Employers' Liability Act "must be more than a scintilla" (p. 479), and in laying down the rule when a verdict should be directed said (pp. 479, 480):

> "When the evidence is such that **without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,** the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (citing authorities) (Emphasis supplied) *

Petitioner's assertion that this respondent was negligent amounts in substance to a contention that the railway company was negligent in failing to assign its yardmaster or other supervisory employee, to see, that the petitioner not only performed his assigned duties, but also to watch over him and prevent him, if necessary, from injuring himself by his own wilful conduct.

No such duty was imposed by law upon this respondent.†

We respectfully submit that the appellate court did not err under these facts in holding that the trial court should have directed a verdict.

The petitioner adverts to certain cases (decided by this court and by the courts of review of the State of Illinois) as authority for his assertion that there was evidence of negligence which required submission of the case to the

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* This court has often refused certiorari to state courts where a verdict was directed in the state court because the evidence failed to show any negligence on the part of the railway company (see, appendix to Mr. Justice Douglas' opinion in *Wilkerson* v. *McCarthy*, 336 U. S. 53 at p. 72).

† *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476; *Hunter* v. *Texas Elec. Ry. Co.* (Tex.-1946) 194 S. W. (2d) 281, aff'd. 332 U. S. 827.

jury. With the rules of law laid down in the cited authorities, we have no quarrel. In each of the cited cases there was factual evidence (totally lacking in the present case) of negligence on the part of the railway company. It would, therefore, serve no useful purpose to recite the facts in each cited case and demonstrate their inapplicability to the facts in the present case.

We respectfully suggest that what the Utah Supreme Court said in disposing of a case under facts almost identical with the facts in the present case, is particularly appropriate.*

C.

Petitioner's injuries solely and proximately resulted from his violation of well known rules of the respondent which it was his duty as conductor in charge of the switching operation to enforce and himself obey.

At the time of this occurrence there were certain railway rules in force and effect concerning petitioner's duty in connection with the operation and conduct of the switching operation.† (Rules 105-B, 108, and Safety Rule 1507)

The petitioner testified it was his duty to enforce these rules and to see that a car moved into an industry "would travel free and clear of obstructions." (R. 110). As we suggested above, it was petitioner's duty not only to obey, but to enforce obedience to these rules.

While it is true that the Appellate Court did not directly base its decision on this ground, it recognized and applied the rule of law that where the injury *solely and proximately*

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* In *Lasagna* v. *McCarthy* (Utah) 177 P. (2d) 734, cert. den. 332 U. S. 829, it was said that, "it would be unreasonable to hold that in a suit by the employee, his own negligence is the negligence of his employer."

† The substance of these rules is shown in a footnote in this brief, see p. 6.

resulted from the plaintiff's direct violation of a known rule, there can be no recovery under the provisions of the Federal Employers' Liability Act.‡

The petitioner knew the company rules with reference to safety requirements in the movement of trains. He was in charge and could have stopped the train movement at any time. He knew and saw the danger, notwithstanding his knowledge of these facts, he voluntarily elected to leave a place of safety and to go into a position of danger. As the sole and proximate result of his conduct in this respect he sustained the injuries about which he now complains.

CONCLUSION

It is respectfully suggested that in view of the foregoing reasons, this court should deny the writ of certiorari prayed for by the petitioner.

Respectfully submitted,

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‡ *Hunter* v. *Texas Elec. Ry. Co.* (Tex.) 1994 S. W. (2d) 281 aff'd. 332 U. S. 827; cf. *Lasagna* v. *McCarthy* (Utah)) 177 P. (2d) 734, cert. den. 332 U. S. 829; *Willis* v. *Pennsylvania R. Co.*, (2d Cir.) 122 F. (2d) 248, 249, cert. den. 314 U. S. 684; *Missouri Pac. R. Co.* v. *Guy* (Ark.) 157 S. W. (2d) 11, 14, cert. den. 317 U. S. 702.